No. 12427

In the United States Court of Appeals for the Ninth Circuit

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

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AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

Suit was filed in the Municipal Court of the City and County of San Francisco, California, by Petaluma and Santa Rosa Railroad Company, a California corporation, against Commodity Credit Corporation, a Delaware corporation, and Poultry Producers of Central California, a corporation, for supplemental freight charges (R. 3). The suit was removed to the United States District Court for the Northern District of California, Southern Division (R. 18). The suit arose under a law regulating commerce (49 U. S. C. sec. 6), and the District Court had original jurisdiction (28 U. S. C. (1940 Ed.), sec. 41 (8)). The suit was therefore removable to the District Court

from the Municipal Court (28 U. S. C. (1940 Ed.), sec. 71).[1]

Following answers and trial upon stipulations of fact (R. 19, 23, 49), the District Court entered final judgment for plaintiff (R. 43, 47) from which Commodity Credit Corporation duly appealed (R. 47). This Court now has jurisdiction to review the District Court's judgment (28 U. S. C. sec. 1291).

QUESTION PRESENTED

The question presented is the determination of the lowest freight rate under the tariffs of the United States railroads from Sweetgrass, Montana, on the Canadian boundary, to Petaluma, California, applicable to several carloads of grain which were imported from Canada under a wartime Federal relief program. This involves the interpretation of a tariff rule published by the Great Northern Railway Company.

TARIFF PROVISION

a. Great Northern Rule 143

Great Northern Railway Company Rules Tariff (R. 66), Item No. 143, reads as follows (R. 67):

> ITEM NO. 143. GRAIN, SEEDS, ETC., PLACED ON TRACK FOR INSPECTION AND HELD FOR DISPOSITION ORDERS

[1] The District Court's jurisdiction was not affected by the 1948 Revision of Title 28 of the U. S. Code. See 28 U. S. C. sec. 1337, 1441. Commodity Credit Corporation, the Delaware corporation, has been dissolved pursuant to the Act of June 29, 1948, ch. 704, 62 Stat. 1075, 15 U. S. C. (Supp. II) sec. 714n, o. It retains corporate existence for the purpose of this appeal for three years following dissolution. See Revised Code of Delaware, chap. 65, sec. 42.

Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car *or* from the point at which it becomes subject to combination of rates as provided in this rule. [Italics added.]

Expires six months after the termination of the present war.

(The form of this publication is permitted by authority of the Interstate Commerce Commission permission No. 9014 of May 6, 1942.)

b. Amendment of the rule

The second paragraph of the text of Rule 143 was amended by the addition of a phrase by the carriers

in November 1948, effective February 16, 1949, so as to read as follows:

> In applying this rule, the number of stops for inspection (or diversion or reconsignment without inspection) shall be reckoned from the last point of loading of car, *or the point where the car comes in possession of carriers within the United States,* or from the point at which it becomes subject to combination of rates as provided in this rule. [Our italics show the addition.]

The notice of this amendment by the carriers contained the following statement: *The above-mentioned change is for clarification purposes"* (R. 63–65). [Italics ours.]

The question is whether a stop for inspection in Canada, which was required by Canadian law and was made before the cars were received from the Canadian carrier by Great Northern Railway Company at Sweetgrass, must be included in counting the stops allowed by the original Rule 143 when applying the Great Northern tariff rates from Sweetgrass to the shipments of grain imported from Canada.

STATEMENT OF THE CASE

In 1944 Commodity Credit Corporation, an instrumentality of the United States,[2] was engaged in a special emergency wartime Government relief program to import and distribute certain vital agricultural commodities. In the course of the program Commodity Credit Corporation purchased a large

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[2] See Title 15, U. S. C. (1946 Ed.), sec. 713.

volume of Canadian grain. The shipments involved in this case were eight carloads of this Canadian grain, which were purchased, transported, and distributed as a part of the program (R. 26). This is a test case which will govern several other pending suits involving the same issue.

The boundary point where all these shipments entered the United States was a point where a line of the Canadian Pacific Railway from interior Alberta connects with a line of the Great Northern Railway running to interior Montana. Canadian Pacific calls this point Coutts (Alberta) whereas Great Northern calls it Sweetgrass (Montana) (R. 50). Coutts and Sweetgrass are the same point, and there the title to the grain passed to Commodity Credit Corporation as purchaser (R. 51).

The typical L & N Car

The history of the shipment in the L & N car is typical of all involved here (R. 52). It was shipped by the Alberta Wheat Pool at Etzikom, Alberta, on April 11, 1944. Canadian Pacific as the carrier issued a bill of lading (R. 50, 70, 71) showing that the shipment was received with freight charges prepaid to Coutts (Sweetgrass), the port of entry, where Canadian Pacific was to deliver the car to Great Northern for the account of and subject to the order of Commodity Credit Corporation. The destination originally named in that bill of lading was Ogden "for Inspection and Diversion" (R. 70).

Before reaching the International Boundary the car was stopped in transit and inspected at Leth-

bridge, Alberta, in order to comply with Section 55 of the Canada Grain Act of 1930 (20–21 Geo. V, ch. 5). (R. 53, 73.)

Upon arrival at Sweetgrass (Coutts), Canadian Pacific delivered possession of the car to Great Northern. At that point the title and control over the shipment were vested under the terms of the purchase contracts in Commodity Credit Corporation. This control was exercised by blanket instructions to Great Northern to reconsign the shipments at Sweetgrass to Spokane (R. 69). Great Northern so received the car and transported it. At Spokane the car was inspected and ordered diverted or reconsigned on a new straight bill of lading to Poultry Producers of Central California, at Petaluma, California (R. 74). The straight bill of lading apparently was not actually issued, but its absence was a bookkeeping detail which would not affect the rates (R. 54). The car moved to Petaluma via Great Northern and connections, being delivered at Petaluma by appellee to Poultry Producers of Central California[3] (R. 54).

The freight charges

Original Basis.—Following arrival of the cars at Petaluma, appellee billed the new consignee for the freight charges from Sweetgrass to Petaluma, calculating them at a rate of 68¢ per cwt., the rate quoted in the Great Northern's tariffs as applicable to shipments of bulk grain in carload lots from Sweetgrass via the actual route to Petaluma, but subject to the provisions of Rule 143 (R. 55–58). The stops in

[3] The events in the movement of L & N car are shown in the way bill which is reproduced in the Record (R. 76).

transit were counted as follows: *first,* an inspection at Spokane (Hillyard); *second,* a reconsignment at Spokane (see R. 78). These did not exceed the free allowance. The charges so calculated were duly paid by Commodity Credit Corporation (R. 56, 57).

Revised Basis.—Later, appellee submitted a supplemental freight bill, in which the rate was restated on a revised basis as the combination of (a) 40¢, the lowest rate from Sweetgrass to Spokane, plus (b) 50¢, the lowest rate from Spokane to Petaluma, making a total of 90¢ from Sweetgrass to Petaluma, with an inspection fee added (R. 56, 79).

This suit is for the unpaid portion of the charges calculated on the revised basis on all eight shipments in the total principal sum of $1,954.14 (R. 4, 59–60).

The revised basis was adopted by appellee as the lowest tariff rate on the hypothesis that the 68¢ rate did not apply. The 68¢ rate from Sweetgrass was rejected on the ground that the shipments' stops in transit exceeded the free allowance prescribed by Rule 143. Appellee supports this view only by counting the stops in transit from the Canadian point of origin so as to include the inspection in Canada required by the Canada Grain Act, *supra* (R. 58).

Appellant considers the original basis of the freight charges correct and counts the stops from Sweetgrass, the point where the shipments first became subject to the Great Northern tariffs (including its Rule 143). Under appellant's view the shipments did not exceed the two free stops in transit allowed by Rule 143 as a

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condition of obtaining the 68¢ rate from Sweetgrass to Petaluma.

The District Court accepted appellee's view and held that the Canadian stop must be included in the count (R. 26–31).

SPECIFICATION OF ERRORS

1. The District Court erred in finding, concluding, and holding that the Great Northern Tariff Rule 143 required that in counting the stops in transit for the purpose of applying a Great Northern rate in the United States having its point of origin at Sweetgrass the inspections and diversions of these shipments must be counted from "the original point of origin in Canada" and must include those made in Canada solely under foreign tariffs before arrival at Sweetgrass. With respect to this grain the record does not disclose what "the original point of origin in Canada" was, or how many inspections, reconsignments, or reshipments it may have received in Canada. The District Court considered only the inspections and diversions or reconsignments from the Canadian point of origin shown on the last bills of lading issued in Canada, which consisted of the inspection made at Lethbridge, Alberta, under Section 55 of the Canada Grain Act, *supra,* and that was error. (R. 38, Finding X; R. 41, Conclusion 1.)

2. The District Court erred in finding, concluding, and holding that the applicable United States rate from Sweetgrass to Petaluma was a combination of (*a*) the rate from Sweetgrass to Spokane, the third point of inspection or diversion after leaving the

Canadian point of origin shown on the Canadian bills of lading (not the third such point after leaving Sweetgrass), plus (*b*) the rate from such third point (Spokane) to Petaluma, totaling 90¢ per cwt. from Sweetgrass, rather than 68¢ per cwt., the flat rate from Sweetgrass to Petaluma. (R. 38 et seq. Finding X, XIV, Conclusions 1, 2.)

3. The District Court erred in finding, concluding, and holding that the difference between the sum collected and the sum due was $1,954.14. (R. 40, Finding XV; R. 42, Conclusion 3.)

4. The District Court erred in not finding, concluding and holding that the shipments were not under the jurisdiction of or subject to the Great Northern tariffs, including its Rule 143, nor moving on any Great Northern tariff rate, until they entered the United States and were received by the Great Northern at Sweetgrass; and that the provision for free stops for inspection and diversion (or reconsignment) in Great Northern Rule 143 did refer, was intended to refer, and could lawfully refer only to the stops made while the shipments were subject to a Great Northern tariff rate, that is to say, to the stops in transit between Sweetgrass and Petaluma; and that the free allowance provided in Rule 143 was not exceeded.

5. The District Court erred in not finding, concluding and holding that the 68¢ rate from Sweetgrass to Petaluma, which would have applied if the shipments had been loaded at Sweetgrass (R. 59), was the highest rate from Sweetgrass lawfully chargeable for these shipments.

6. The District Court erred in not finding, concluding and holding that to charge for the shipments more than would have been charged if they had been actually loaded at Sweetgrass would have constituted an unlawful discrimination against appellant and against Canadian grain, and that in interpreting Rule 143 the Court should presume that the carriers did not so intend and should presume that they intended that the stops in transit should be counted from Sweetgrass.

7. The District Court erred in not finding, concluding and holding that determinative weight should be given to the subsequent formal statement of the Great Northern and other United States carriers in amending Rule 143 so as expressly to permit the free stops to be counted from the point of entry into the United States, in this case Sweetgrass, which amendment was expressly stated by the carriers to be for clarification of the rule (R. 63–65; cf. R. 30).

8. The District Court erred in entering judgment for appellee, and in denying the motion for a new trial, and in not entering judgment for appellant.

SUMMARY OF ARGUMENT

A. Great Northern Rule 143 was only a footnote to Great Northern tariff rates from Sweetgrass, Montana. The Great Northern rates were not joint international rates from Canadian Pacific points. Hence, Rule 143 did not govern the shipments from Canada until they were received by Great Northern from Canadian Pacific at Sweetgrass. This limitation in the scope of Rule 143 appears on the face

of the tariffs, considering Rule 143 together with the rate quotation incorporating it by reference, and together with the title page of the Rules Tariff. In construing Rule 143 all ambiguities and doubts are to be resolved in favor of this view, particularly since Great Northern expressly adopted it by a clarifying amendment, and since appellee's view is unreasonable, discriminatory and unlawful.

B. However, if appellee's view prevails it is only because a fiction of continuity is applied so as to make the reshipments at Sweetgrass "reconsignments." If that fiction penalizes the shipper by increasing the rate instead of accomplishing its purpose of preserving the lowest rate, then the transactions at Sweetgrass should stand as reshipments, so that appellant may pay the lower combination of the rate for a shipment to Sweetgrass plus the 68¢ rate for a reshipment from Sweetgrass.

ARGUMENT

A. The Great Northern's tariffs published the 68¢ rate from Sweetgrass to Petaluma which governed these shipments

1. The charges are computed according to the rates and rules published by the carrier transporting the goods

The tariffs of any carrier can govern a shipment only to the extent that they may have been invoked by a contract of carriage covering the shipment which provides for transportation over the particular carrier's lines subject to its tariffs. When, as here, a bill of lading provides for transportation over the lines of a series of carriers, it is in effect a series of contracts between the shipper and each carrier.

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(R. 70.) All bills of lading recite that the goods are received subject to the current tariffs (R. 70). This serves to incorporate by reference the published tariffs of each named carrier for transportation of the shipment over its lines. Its rules permitting inspection and reconsignment in transit are part of each carrier's tariffs.

> Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. *Kansas City Hay Dealers* v. *Atchison, T. & S. F. Ry. Co.,* 74 I. C. C. 352, 356.

Frequently a carrier's tariffs publish two or more rates for shipments meeting the description on the bill of lading, and when that sort of ambiguity appears the lowest rate or combination of rates applies, by a familiar rule of construction. There can finally be only one applicable rate. *United States* v. *Gulf Refining Co.,* 268 U. S. 542.

Canadian Pacific's contracts herein were contained in its bills of lading, by virtue of which it undertook (*a*) to transport the grain as bailee and common carrier, freight prepaid, to Coutts (Sweetgrass), stopping for an inspection at Lethbridge, Alberta, as required by Section 55 of the Canada Grain Act, *supra,* at the lowest rate provided in its tariffs filed with the Board of Transport Commissioners at Ottawa;[4] and (*b*) at Coutts (Sweetgrass) to deliver the loaded cars to Great Northern as bailee for appellant.

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[4] See Canadian Railway Act of 1919, Rev. Stat. ch. 170, sec. 323, and Transport Act of 1938, 2 Geo. VI, chap. 53, sec. 3, 35.

The effect of the Lethbridge inspection must be taken into consideration in applying the Canadian Pacific tariffs to Sweetgrass, since Lethbridge was a stop on the Canadian Pacific Railway. (R. 51, 53, 70, 73.)

Great Northern's contracts were contained in the original bills of lading (issued by Canadian Pacific as agent) as modified or modifiable by virtue of (*a*) appellant's blanket instructions (R. 69) as Great Northern received the loaded cars at Sweetgrass, and by virtue of (*b*) appellant's second diversion orders at Spokane (R. 54, 74).[5] Great Northern undertook to receive the grain in loaded cars at Sweetgrass as bailee for appellant, to transport it via Spokane to the point of interchange with the next carrier[6] en route to Petaluma, and at such interchange point to deliver it to the next carrier for the account of the final consignee. Great Northern undertook to perform this service, and to permit the inspection at Hillyard (Spokane) and the reconsignment at Spokane, at the lowest rates which were published in its tariffs filed with the Interstate Commerce Commission at Washington (49 U. S. C. sec. 6) as applicable to such shipments moving over its lines from Sweetgrass (via Spokane) to its point of interchange with the next carrier en route to Petaluma.

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[5] It is stipulated that appellant was entitled to a new bill of lading on the second diversion, and that its absence would not affect the rates (R. 54, 74). Appellant was likewise entitled to a new bill of lading at Sweetgrass, and its absence would not affect the rates.

[6] The next carrier was Southern Pacific Company (R. 71, 74).

2. The authority of Rule 143 was coextensive with the 68¢ rate

The 68¢ rate, which appellant believes to be the applicable rate, was published by Great Northern Railway Company (through an agent) in Pacific Freight Tariff Bureau Tariff No. 241–B. (R. 55). This tariff named the 68¢ rate as applicable to shipments originating on the Great Northern Railway at Sweetgrass or received there from Canadian points (R. 55). The number of free inspections or reconsignments allowable under this rate from Sweetgrass was limited by Rule 143 of the Great Northern Rules Tariff, which was incorporated into the 68¢ rate quotation in Tariff No. 241–B. by reference. Only thus was Rule 143 invoked and brought into the situation.

The Rules Tariff could be applied only to movements made under tariff rate quotations expressly incorporating the Rules Tariff by reference. As the Interstate Commerce Commission said about another reconsignment tariff—

> The rules in the reconsignment tariff have application only when, as here, the tariff naming the line-haul rates makes reference thereto. *Jacob & Co.* v. *Michigan Central R. Co.,* 210 I. C. C. 433, 434. See also *Washington Broom & Woodenware Co.* v. *Chicago, R. I. & P. Ry. Co.,* 15 I. C. C. 221.

The Great Northern Rules Tariff was not incorporated or referred to in the separate Canadian Pacific rate tariffs. It was invoked only to govern the terms of the transportation on Great Northern lines from Sweetgrass. The scope of the rule is coextensive with the scope of the rate which it modifies, and Rule

143 is only a footnote to Great Northern rate quotations.

Although appellee concedes that if the shipments had originated at Sweetgrass the stops in transit would be counted from Sweetgrass, it insists that because these particular shipments were initiated in Canada, the stops must be counted from the Canadian Pacific point of origin, so as to include any known stop made in Alberta even though made before the shipments ever acquired any relation to the Great Northern tariffs whatsoever. This is forcibly to make Rule 143 a Canadian Pacific tariff rule.

Appellee's theory produces absurdity. The record does not show where this grain originally came from; it only shows that it was shipped to the United States from a point in Alberta on a Canadian Pacific bill of lading to the order of Commodity Credit Corporation. This may quite possibly have been a reconsignment or reshipment; if so, then Lethbridge, Alberta, where the grain was inspected, would be the *second* stop, and Sweetgrass the *third,* and under appellee's view the applicable rate would then be a combination of the Canadian rate of 15½¢ to Sweetgrass plus the Great Northern rate of 68¢ from Sweetgrass to Petaluma. But, that is the rate for which appellant is now contending. Does appellee deny it because there were at once too many stops and also too few?

Pursuing absurdity further, if the inspection at Lethbridge had been the *third* inspection or reconsignment, then under appellee's view Great Northern's

Rule 143 would deny the through rate from the Canadian point of origin on the Canadian Pacific line to Sweetgrass, regardless of whatever the Canadian Pacific tariffs might provide.

3. The scope of Rule 143 is limited on the face of the Rules Tariff

Another clue to the limited scope of Rule 143 clearly appears on the tariff itself. In construing a tariff (like any ordinary contract or statute) the entire instrument must be visualized. Rule 143 was merely one part of a whole system of regulation published in the Great Northern Rules Tariff. In order to ascertain its scope, it is necessary, as shown, to examine the rate tariff provision which invoked it by reference as a condition of the particular rate. The title page of the Rules Tariff itself should also be examined. It reads as follows:

> GREAT NORTHERN RAILWAY COMPANY
>
> In Connection With
>
> FARMER'S GRAIN AND SHIPPING COMPANY
> THE MIDLAND RAILWAY COMPANY OF MANITOBA
>
> ---
>
> LOCAL AND JOINT FREIGHT TARIFF
>
> Providing
>
> RULES AND CHARGES
>
> Governing
>
> The Diversion or Reconsignment of Freight and Holding of Cars for Surrender of Bills of Lading or Written Orders, or Inspection *at points on the above-named lines.* (R. 67.) [Italics added.]

Rule 143 is merely a subheading under that title. Nothing could be clearer than that Rule 143, when invoked by the Great Northern tariff quotation of the 68¢ rate from Sweetgrass, refers to diversions and reconsignments "at points on the above-named lines," and not on the Canadian Pacific.

For Great Northern to vary the number of free stops allowed on its lines after leaving Sweetgrass because of what happened under another jurisdiction while the grain was moving under a separate rate contract with Canadian Pacific, under terms published by separate tariffs filed in Ottawa, is as preposterous as if a court in a jury trial should grant both parties ten peremptory challenges and then allow the defendant only six because he had used four in another proceeding against another party in another court in another State.

Appellee and Great Northern could have combined with Canadian Pacific to publish a through joint international rate from Alberta to Petaluma, invoking by reference Rule 143 for coextensive application. But they did not so combine. Great Northern and appellee simply contracted to transport grain from Sweetgrass to Petaluma at 68¢ under certain express conditions. Appellant merely seeks to hold them to those conditions.

4. Ambiguities and doubts must be resolved in favor of appellant

The purpose of Rule 143 was to cut down on the stops in transit for inspection and reconsignments by requiring the third stop to be treated as a reshipment, as a means of inducing shippers to unload scarce cars and make them available for another

loading sooner (R. 62). The purpose and concern of the Great Northern managers, when adopting Rule 143 (or when making any other tariff amendment) extended only to the limits of their lines, which were the realm of their operations and traffic movements. Their concern did not extend to Canadian Pacific lines in Canada. Any governmental agency in the United States participating in the promulgation of the Rule, such as the Interstate Commerce Commission, would have contemplated a rule applicable to railroads in the United States only. 49 U. S. C. sec. 1. The Dominion of Canada and the great Canadian railroad systems had their own car problems and solutions and their own system of railroad tariff regulations.[7]

Appellee showed that Rule 143 was ambiguous by billing the consignee successively two different ways (R. 78–80). The court must resolve ambiguities and doubts in favor of the shipper. These are "fine-type" contractual provisions and awkwardly worded and published by the carriers themselves. Where two alternatives are provided the shipper is entitled to the alternative most favorable to him, and when a provision is capable of two meanings he is entitled to have applied the meaning most favorable to him. These are familiar principles of railroad tariff regulation and interpretation. *Southern Pacific Co.* v. *Lothrop,* (C. A. 9) 15 F. (2d) 486, cert. denied 273 U. S. 742; *Great Northern Ry. Co., et al.* v. *Commodity Credit Corporation,* 77 Fed. Supp. 780; *Pillsbury Flour Mills* v. *Great Northern R. Co.,* 25 F. (2d) 66 (citing earlier cases).

[7] See note 4, supra.

5. Appellant is only urging the interpretation formally adopted by Great Northern in its amendment of Rule 143 expressly for clarification, which should be determinative

Rule 143 originally gave the shipper two free inspections and reconsignments and required that the third be treated as a reshipment. The shipper had the option to count the inspections and reconsignments from either (*a*) the last point of loading or (*b*) "the point at which it becomes subject to combination of rates as provided in this rule." As Commodity Credit Corporation executed its historic emergency grain import program, controversy developed over the very point now at issue. After the time of the shipments in this proceeding, the United States carriers, including Great Northern, attempted to settle the controversy by adopting appellant's view. This was specially published in a formal amendment which specifically added (*c*) "or the point where the car comes in possession of carriers within the United States." This they expressly declared to be "for clarification purposes." Appellant's view, then, represented the intent of Great Northern all along, and the Court should adopt it.

> Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law. *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468.

6. Appellant's lawful interpretation should be favored over plaintiff's unlawful interpretation

Railroad tariffs in the United States, when filed with the Interstate Commerce Commission, become a

part of the Federal system of legislative rate regulation and have the force of law. 49 U. S. C. sec. 6 (1), 6 (7).

> It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases. *Bull S. S. Lines, Inc.* v. *Thompson,* (C. A. 5), 123 F. (2d) 943, 944; citing *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, and *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94. See *Pillsbury Flour Mills* v. *Great Northern R. Co., supra.*

Hence the Court by a familiar rule of statutory construction should favor a lawful interpretation over an unlawful one and should presume that Great Northern, *et al.,* did not intend an illegality. Under appellee's view Rule 143 would be illegal. It would violate several provisions of the Interstate Commerce Act, 49 U. S. C. sec. 1–4, including the following:

> *Section 1 (4)*, requiring United States railroad carriers to provide just and reasonable rates.
>
> *Section 1 (5)*, prohibiting every unjust and unreasonable charge for the transportation of goods.
>
> *Section 1 (6)*, requiring just and reasonable regulations and practices affecting the handling and transporting of goods and prohibiting every unjust and unreasonable regulation and practice.

Section 2, prohibiting discrimination by carriers' charging more for one shipment than for another for a "like and contemporaneous service" in "transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3 (1), prohibiting an undue preference (with corresponding prejudice) to any person, locality, or traffic.

Section 4 (1), prohibiting the charging of a through rate that exceeds the aggregate of intermediate rates, without specific approval of the Interstate Commerce Commission following investigation.

Appellee's interpretation would make Rule 143 as applied to these shipments unjust, unreasonable, discriminatory, prejudicial, and unlawful. It is impossible for plaintiff to show any consideration which would validate under the Interstate Commerce Act a railroad rate from Sweetgrass 32 percent greater for Alberta grain than for Montana grain. Great Northern would perform no greater service for the import grain than for domestic grain. Very likely it would perform less, receiving Alberta traffic from Canadian Pacific at Sweetgrass by the trainload, and having its crews simply make a routine train inspection, attach its locomotive and caboose, and move the train on southward. For Montana grain Great Northern would have to provide an empty car in proper condition, place it on the shipper's siding for loading, inspect the loading, and pick up and assemble the car into an outbound train. After leaving Sweetgrass imported and domestic carloads would be treated

identically. Denial of the 68¢ rate would be a gross discrimination against Canadian grain.

To implement the "aggregate of intermediates clause" (Section 4 (1), *supra*) the Commission has published a declarative statement in its Tariff Circular 20, which shows its opinion as to the reasonableness (and hence lawfulness) of charging more for a long-haul than for the sum of intermediate hauls in the same route, as follows:

> 56. *Reduction of Rate to Equal the Aggregate of the Intermediate Rates.*—(a) Section 4 of the Act, as amended, prohibits the charging of any greater compensation as a through rate than the aggregate of the intermediate rates that are subject to the act. The Commission has frequently held that through rates which are in excess of the sum of the intermediate rates between the same points via the same route are prima facie unreasonable. * * * It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider a rate which is higher than the aggregate of the intermediate rates between the same points via the same route as prima facie unreasonable and that the burden of proof would be upon the carrier to defend such unreasonable rate.
>
> (b) Where a rate is in effect by a given route from point of origin to destination which is higher than the aggregate of intermediate rates from and to the same points, by the same or another route, such higher rate may, on not less than one day's notice to the public and the Com-

> mission, be reduced to the actual aggregate of such intermediate rates. * * *.

The aggregate of intermediate rates from Alberta to Petaluma is 83½¢ (15½¢ plus 68¢). To charge $1.055 (15½¢ plus 40¢ plus 50¢) is therefore unjust, unreasonable, and unlawful.

B. If the reconsignments at Sweetgrass necessitate counting the Canadian stop in applying Rule 143, then appellee is entitled to have the transactions at Sweetgrass treated as reshipments so as to obtain a combination of the rate to Sweetgrass and the 68¢ rate from Sweetgrass

It is agreed that if the shipments had been loaded at Sweetgrass the 68¢ rate to Petaluma would have applied (R. 59). Hence, if the shipments had come in from Canada to Sweetgrass, and had been there wastefully unloaded and reloaded, the 68¢ rate would have applied, since Sweetgrass would then have been the last point of loading. Furthermore, if, when the shipments came into Sweetgrass, Commodity Credit Corporation had exercised its option of making Sweetgrass a destination point and had then reshipped out of Sweetgrass on a new bill of lading, then Sweetgrass would have been the Great Northern's *bill of lading* point of origin as well as its *rate* point of origin, so that appellee would have counted the inspections and reconsignments from Sweetgrass, and the 68¢ rate to Petaluma would obviously have been applied. Appellee is now trying to penalize appellant for not having exercised its right of breaking the course of the shipment more drastically at Sweetgrass. Instead of a new shipment or "reshipment" at Sweetgrass there was a "reconsignment," and appellee would

apply this special "rate benefit" so as to bar the 68¢ rate. But if it barred the low rate, then reconsignment was no benefit, and should be disregarded.

Reconsignment historically came into practice as a "transit privilege" extended through special tariff rules to shippers solely for their financial benefit and in order to enable them to change the destination point yet still preserve the *benefit* of any through rate from the original point of origin to final destination. It is an optional concept of fictitious continuity applied in order to avoid the application of a higher combination of the rates to and from the point of the reshipment or reconsignment.

> Reconsignment, as technically understood, is a *privilege* extended by carriers to shippers under which goods may be forwarded to a point other than their original destination, without removal from the car and *at the through rate from the initial point to that of final delivery.* This application to the shipment of the through rate—which is often less than the sum of the intermediate rates in and out of the point of original destination—is the distinctive feature of reconsignment, and separates it from reshipment, which is otherwise quite similar. *Any consignee has a right to reship goods received by him, without removal from the car, upon payment of the freight charges to that point, the goods going forward under a new transportation contract.* This is an incident to the transportation facilities offered, while reconsignment is a privilege that exists only under

> the permission granted in the tariff and that must be exercised only under the rules and conditions there laid down. When the through rate is equal to the sum of the intermediates in and out, reconsignment and reshipment differ only as to the rules applicable to them, particularly the rules found in the demurrage codes of the carriers. *Detroit Traffic Assoc.* v. *Lake Shore & M. S. R. Co.,* 21 I. C. C. 257, 258. [Italics added.]

Reconsignment is only an artificial concept of continuity which the railroads by special rule consent to adopt for the shipper's benefit. It is the railroad agreeing to ignore a reshipment. When appellant gave orders to "divert to Spokane" (R. 69), then, if the artificial reconsignment concept operates so as to penalize rather than to benefit, then appellant would let the reshipments at Sweetgrass stand for what they were—reshipments. The 68¢ rate then applies.

This would be a freakish situation, where a reconsignment privilege, by increasing the rate, would do just the opposite of what it was intended to do. Such frustration of intent could occur only under the appellee's method of applying Rule 143, which further discredits that method. Properly applied, Rule 143 produces no such paradox.

CONCLUSION

For the reasons above stated and discussed appellant prays the Court to reverse the District Court and to order judgment for appellant.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of this brief on counsel for the appellee by mailing.

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